Commonwealth of Massachusetts
Office of the Attorney General

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THE RIGHTS OF INDIVIDUALS WITH DISABILITIES IN THE SCHOOL CONTEXT

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A. Introduction

More than twenty years ago, Section 504 of the Rehabilitation of Act of 1973, 29 U.S.C. § 794, ("Section 504") was enacted. Section 504, the first federal statute to extend the protections of the federal civil rights statutes to individuals with disabilities, prohibited discrimination against "the handicapped" by any program which receives federal financial assistance. Public schools, all of which receive federal financial assistance within the meaning of the statute, have been subject to the non-discrimination mandate of Section 504 since that time.

Seventeen years later, on July 26, 1990, the President signed the American with Disabilities Act ("ADA"), a landmark statute which some disability advocates have characterized as their "Magna Carta".

While the ADA consists of five different titles, each of which covers a different legal context or type of entity, Title II, which covers "public entities", is the title which applies to public schools. "Public entity" is defined as "any state or local government; any department, agency, special purpose

district or other instrumentality of a state .. or local government." 42 U.S.C. § 12115.

Thus, public schools, both as recipients of federal financial assistance and as public entities, are prohibited from discriminating against individuals with disabilities by both Section 504 and Title II of the ADA. Substantively, the two statutes are virtually the same. As recognized in the legislative history, Title II of the ADA imposes the substantive requirements of Section 504 on all public entities, regardless of whether they receive federal financial assistance . 28 C.F.R. Appendix § 35.103. Since school systems have been subject to the non-discrimination mandate of Section 504 for so long, and have developed greater familiarity with its provisions, this article will focus primarily on the requirements of the ADA, and cite the relevant provisions of the 504 regulations, where appropriate.

It is important to note that although the focus of legal rights for individuals with disabilities is often centered upon students with disabilities, in fact there are at least three categories of non-students who are protected by the ADA and Section 504 in a school setting: 1) employees with disabilities, 2) parents with disabilities, and 3) members of the public with disabilities who attend school or non-school functions in school buildings. As explained in the analysis section which accompanies the ADA regulations that delineate the scope of their application, "public school systems must comply with the ADA in all of their services, programs or activities, including those open to parents or to the public." 28 C.F.R. Appendix §35.102. Examples

include "graduation ceremonies, parent-teacher organization meetings, plays and other events open to the public and adult education classes." Id.

Three other prefatory remarks are appropriate. First, private schools, as "places of education", 28 C.F.R. § 36.104, are considered public accommodations within the meaning of Title III of the ADA, and as such are subject to its non-discrimination requirements. 28 C.F.R. Part 36. Private schools, which do receive federal financial assistance, such as almost all colleges and universities, are also subject to the requirements of Section 504. A discussion of Title III of the ADA is beyond the scope of this chapter, but organizations that can provide useful information on Title III and other ADA issues are listed in Attachment A. Second, at the time of the enactment of the Rehabilitation Act, appropriate language for referring to individuals with disabilities included the term "handicapped." The currently accepted terminology of choice is "disability", with the emphasis on the individual, rather than the disability. Thus, "individual with a disability" is the language used in the ADA. Although there is no substantive difference between the terms "handicap" and "disability", see 28 C.F.R. Appendix § 35.104, this chapter will follow the usage preferred by individuals with disabilities, except where required to use the precise language of Section 504. Third, the other significant federal statute that affords legal rights to individuals with disabilities in the school context, and would fall within the scope of this chapter is the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq. The legal rights of students with special needs is thoroughly covered in a separate chapter of this book.

B. Essential Principles

Subtitle A of Title II of the ADA (which are the generally applicable provisions of the Act, in contrast to subtitle B, which applies to public transportation systems) is barely more than a page in length. Its prohibition of discrimination states:

> "... no otherwise qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."
>
> 42 USC § 12132.

Also included within the statute was the requirement that the Attorney General promulgate implementing regulations. Those Title II regulations, 28 C.F.R. Part 35, apply the above general prohibition of discrimination to various aspects of governmental entities.

Prior to a discussion of the substantive requirements of Title II, it is necessary to review the definitions of certain key terms or phrases:

1. Disability: The statute's three-part definition, which essentially adopts the definition used in the Rehabilitation Act of 1973, is purposely quite broad. Under the Act, "individual with a disability" is defined as someone who

> (1) has a physical or mental impairment that substantially limits one or more of the major

life activities of the individual;

(2) has a record of such an impairment; or

(3) is regarded as having such an impairment.

42 USC § 12102(2).

Physical or mental impairment is defined in the regulations as "any physiological disorder, or condition, cosmetic disfigurement or anatomical loss" affecting at least one body system such as neurological or musculoskeletal, or "any mental or psychological disorder." 28 C.F.R. § 35.104 "Major life activities" are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." Id.

As the definition of "individual with a disability" makes clear, the statute also covers an individual who has a history of such an impairment, as well as someone who "is regarded as having such an impairment" -- even if done so erroneously. Examples of people within the first group are persons with histories of mental or emotional illness, heart disease or cancer. Thus, for example, a person who had cancer, but is now completely in remission, would fit within the definition. Similarly, an individual who has a physical impairment, which is not consequential enough to limit a major life activity substantially, but is treated by a school committee as if the person did have such a limitation, would be covered under this third prong of the definition.

As articulated in the legislative history of the ADA, the basis for including

this third category of individuals was a concern that although an impairment itself might not diminish a person's capabilities, societal myths and fears about disability and diseases can have a far more restricting effect. A frequently cited example is a person who was severely burned, and although not substantially limited in any of his major life activities, is denied a position of employment based upon an employer's concern that potential customers might have negative reactions.

Statutorily excluded from the definition of "disability" are a number of conditions, including transvestism, transsexualism, pedophilia, exhibitionism, and voyeurism. Current illegal drug use is also excluded from the Act's protection, although individuals not engaged in current illegal drug use, and who have successfully completed or are currently participating in a drug rehabilitation program, are within the statute's protection. Finally, a school committee may adopt and administer reasonable policies and procedures, including but not limited to drug testing, to ensure that a person who formerly engaged in the illegal use of drugs is not currently doing so.

2. <u>"Qualified Individual with a Disability"</u>

In order to fall within the protection of the statute, it is not sufficient to have a disability, but the person must be a "qualified individual with a disability." ("QIWD") This has been defined as a individual who, with or without a reasonable accommodation, can meet the essential eligibility requirements for receipt of services or participation in the programs or activities of the school. For students with disabilities, being a

"qualified individual with a disability" only requires that an individual be a resident of the district and be of an age when non-disabled students are entitled, under state law, to receive educational services.

C. General Prohibitions Against Discrimination
(Subpart B of the Title II regulations; 28 C.F.R. § 35.130)
(Subpart A of the 504 regulations; 34 C.F.R. § 104.1)

The regulations first restate the statute's overall prohibition:

> "No qualified individual with a disability" [QIWD] shall, on the basis of disability, be
> [a] excluded from participation in,
> [b] denied the benefits of the services, programs or activities. . . or
> [c] subjected to discrimination by any public entity.
> (emphasis added).
> 28 C.F.R. § 35.130.

The regulations then reformulate that general prohibition into numerous variations of specific restrictions. Thus, a school committee, in providing any aid, benefit or service, may not directly, or through contractual, licensing or other arrangements, on the basis of disability:

a. deny a QIWD the opportunity to participate in or benefit from aids, benefits or services;
b. afford a QIWD an opportunity to participate not equal to that afforded others;
c. provide a QIWD with an aid, benefit or service that is not as effective

in affording equal opportunity; or

d. provide different or separate aids, benefits or services to individuals with disabilities or to any class of individuals with disabilities unless necessary to provide a QIWD with aids, benefits or services as effective as that provided to others.

28 C.F.R. 35.130(b).

A school committee may not, in determining the site or location of a facility, do so in way that has the effect or purpose of excluding individuals with disabilities from full participation. School committees may not, directly or through contractual or other arrangements, utilize "criteria or methods of administration" that have the effect of subjecting QIWDs to discrimination on the basis of disability.

"Criteria or methods of administration" is a term of art which is intended to be interpreted as broadly as possible and to encompass official and unofficial policies and practices. Both direct and indirect actions, which have the effect of discrimination, are covered. As one can see, this is probably one of the most profound and far-reaching provisions of the regulations.

A school committee is required to make reasonable modifications to its policies, practices or procedures when necessary to avoid discrimination on the basis of disability, unless it can demonstrate that the modification would fundamentally alter the nature of the program. If, for example, a public university only accepted a driver's license as proof of age for drinking liquor, it would be required to

modify that rule if a person with a sight impairment were without a driver's license, and sought to prove that she was old enough to drink.

Similarly, a public school cannot impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, unless it can demonstrate that the criteria are necessary. The school system may impose neutral rules and criteria that screen out or tend to screen out individuals with disabilities, if the criteria are necessary for the safe operation of the program. It is important to emphasize, however, that safety requirements must be based upon best available objective evidence, and not on speculation, stereotypes or generalizations about individuals with disabilities.

Underlying all of these requirements is the principle that school systems may not exclude or segregate individuals with disabilities or deny equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears and stereotypes about individuals with disabilities. Thus, actions of school committee must be based upon facts applicable to individuals, and not on presumptions as to what a class of individuals with disabilities can or cannot do.

Finally, a school may not assess a surcharge on an individual with a disability or a group of individuals with disabilities to cover the cost of a reasonable accommodation, or the cost of auxiliary aids or services. Thus, a school may not require that a student who is deaf and wishes to attend an after school

activity pay a fee for the cost of a sign language interpreter.

D. Employment
(Subpart C of the Title II Regulations; 28 C.F.R. § 35.140)
(Subpart B of the 504 Regulations; 34 C.F.R. § 104.11)

The largest number of complaints filed under the ADA has been in the area of employment. From July, 1992 to May, 1993, for example, the Equal Employment Opportunity Commission ("EEOC"), which is the enforcement agency for the Title I (private employer) provisions of the ADA, received 10,000 complaints. One would anticipate that allegations of employment discrimination would be the most frequently raised issue for school systems as well.

For the purpose of employment, a "qualified individual with a disability" is defined as a person who:

1) satisfies the requisite skill, experience, education and other job-related requirements ... and

2) can perform the essential functions of such position with or without reasonable accommodation.

29 C.F.R. § 1630.2(m).

Thus, the two-step analysis involves determining first, whether the person possesses the requisite education, employment experience or license, and second, whether the person can perform the essential functions of the position with or without reasonable accommodation.

Essential functions are "the fundamental job duties of the employment

position," 29 C.F.R. § 1630.2(n), i.e. those functions that the individual must be able to do unaided or with the assistance of a reasonable accommodation. 29 C.F.R. § 1630.2(n). This focus upon "essential functions" of a position is based upon the principle that a job applicant should not be denied an employment opportunity due to an inability to perform the marginal functions of a job.

1. "Reasonable Accommodation"

No term is more central to the ADA than that of reasonable accommodation. Employers are required to make reasonable accommodations to the known physical or mental limitations of a qualified applicant or employee, unless doing so imposes an undue hardship. 29 C.F.R. § 1630.9. This reasonable accommodation requirement applies to all employment decisions and the application process. Reasonable accommodations are modifications or adjustments to the work environment or the manner in which the work is customarily performed so as to enable the individual with a disability to perform the essential functions of the job. 29 C.F.R. § 1630.2(o)(1)(11). As explained in the Interpretive Guidance (Guidance), which the EEOC published in conjunction with the Title I regulations, "the reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated." 29 C.F.R. Appendix § 1630.9.

Those barriers could be physical or structural impediments; they might be rigid work schedules; or they could be inflexible work procedures . Id. In some instances, an employer might, as part of its duty to provide a reasonable accommodation, be

obligated to make its existing facilities accessible to and usable by individuals with disabilities. 29 C.F.R. § 1630.2(0)(2)1. Other examples of reasonable accommodations include job restructuring, such as reallocating job functions, allowing modified work schedules, acquiring or modifying equipment, or providing qualified readers or sign language interpreters. 29 C.F.R. Appendix § 1630.2(0)(2)(ii).

An employer is not obligated to provide an accommodation if doing so imposes an "undue hardship" upon the business. "Undue hardship" is defined as "significant difficulty or expense in, or resulting from, the provision of the accommodation." 29 C.F.R. § 1630.2(p). Although the cost of the needed accommodations is a key factor to be considered in evaluating whether the provision of an accommodation imposes an undue hardship, it is not the sole criterion. Undue hardship includes any accommodation "that would be unduly costly, extensive, substantial, disruptive, or that would fundamentally alter the nature or operation of the business." 29 C.F.R. Appendix § 1630.2(p). Where undue cost is the sole basis, the applicant or employee should be afforded an opportunity to pay for that portion of the cost of accommodations that makes it an undue hardship. 29 C.F.R. Appendix § 1630.2(p).

As noted above, an employer is only obligated to provide a reasonable accommodation to the <u>known</u> disabilities of an applicant or employee. An employer might be on notice as to the existence of a disability as a result of the employee having notified it or the disability might be sufficiently obvious that the employer knows of its existence. It is important to keep in mind, however, that while the

existence of the disability might be apparent, what particular accommodation an individual might need, if any, is very much an individualized determination.

Despite an employer's very best intentions to comply with the ADA, an employer might be uncertain as to how to approach the question of affording a reasonable accommodation to an applicant or employee. In its "Interpretive Guidance", the EEOC provides some direction for employers. The Guidance suggests that "the appropriate reasonable accommodation is best determined through a flexible interactive process that involves both the employer and the qualified individual with a disability." 29 C.F.R. Appendix § 1630.9. As described in the EEOC's guidelines, that process involves 1) analyzing the job involved, including a review of the essential functions, 2) consulting with the individual to ascertain what limitations are imposed by the disability and how those limitations can be overcome by a reasonable accommodation, 3) identifying potential accommodations and evaluating their effectiveness, and 4) after taking into account the preferences of the individual, selecting and implementing the most appropriate accommodation for both the individual and the employer. 29 C.F.R. Appendix § 1630.9.

2. Limits on pre-employment inquiries

The ADA provides principles which govern the type of inquiries that an employer may make of an applicant who has a disability. At the pre-employment stage, an employer may not inquire as to whether the applicant is an individual with a disability or as to the nature or severity of a disability. 29 C.F.R. § 1630.13(a)(b). Nor may an employer

inquire as to an applicant's workers' compensation history. 29 C.F.R. Appendix § 1630.13(a). During an interview, while an employer is prohibited from asking an applicant about the existence of or extent of a disability, an employer is permitted to make pre-employment inquiries into an applicant's ability to perform the essential functions of the job, with or without a reasonable accommodation. 29 C.F.R. § 1630.14. The distinction is between impermissibly posing questions about the disability itself -- "do you have a back problem?" -- and appropriately asking the applicant to describe or demonstrate how the individual would perform the particular essential functions of the position . -- "Are you able to unload fifty pound bags of produce for a half-hour four times per week?" At the pre-employment stage, a prospective employer is specifically prohibited from conducting or requiring a medical examination. 29 C.F.R. § 1630.13(a)(b). After the employer has made an offer of employment and prior to the applicant starting work, an employer may condition its offer of employment on the results of a medical examination, as long as all other employees entering that job category are also subject to medical exams. 29 C.F.R. § 1630.14(b).

3. Direct Threat

An employer is not required to hire an individual who poses a "direct threat" to the employer or co-employees. 29 C.F.R. §§ 1630.2(r) and 1630.15(b)(2). "Direct threat" is defined as someone who poses "significant risk of substantial harm to the health or safety of the individual or others that cannot be reduced or eliminated by reasonable accommodation." 29 C.F.R. § 1630.2(r). Determination of what

constitutes a direct threat must be made on an individualized basis and be based upon medical analyses or other objective evidence. The assessment cannot be based on irrational fears, patronizing attitudes, or on stereotypes. 29 C.F.R. Appendix § 1630.2(r).

4. Exhaustion of Administrative Remedies

Although a complainant is jurisdictionally required to file an administrative complaint with the EEOC in order to pursue a case against a private employer under Title I of the ADA, as least one court, Peterson v. University of Wisconsin, 818 F.Supp.1276 (W.D. Wis. 1993), has held that applicants to or employees of public employers are not required to do so. The enforcement section of Title II cites the remedies, procedures and rights of the Rehabilitation Act of 1973, which does not require non-federal employees to exhaust their administrative remedies prior to filing a private cause of action in federal court.

The Massachusetts Attorney General's Disability Rights Project has published, in a short question and answer format, a basic overview of employment rights for individuals with disabilities in Massachusetts written for non-lawyers. Copies can be obtained by contacting the Disability Rights Project.

E. Program Accessibility
(Subpart D of the Title II regulations; 28 C.F.R. § 35.149)
(Subpart C of the 504 regulations; 34 C.F.R. § 104.21)

Under the regulations, no qualified

individual with a disability, shall, due to the inaccessibility of a school system's facilities, be excluded from, denied benefits of or be subjected to discrimination. 28 C.F.R. § 35.149. Both Section 504 and the ADA provide a dual legal standard to assess the accessibility of programs, depending upon whether the building is classified as "new construction" or as an "existing facility".

New Construction or Renovation

Under the ADA, school facilities constructed after January 26, 1992, and parts of school facilities altered after that date are deemed "new construction" and must be fully accessible in accordance with 28 C.F.R. § 35.151.

Under Section 504, school facilities constructed after June 3, 1977, and parts of existing facilities altered after that date are deemed "new construction" and must be fully accessible in accordance with 34 C.F.R. § 104.23.

Existing Facilities

If the facility is an "existing facility" (i.e. buildings constructed before June 3, 1977, under §504, and constructed before January 26, 1992, under the ADA), then the school system is required to "operate each service, program or activity, so that the service, program or activity, when viewed as a whole, is readily accessible to and usable by individuals with disabilities" 28 C.F.R. § 35.150. This principle, which governs existing facilities, entitled "program accessibility" was first used in the Section 504 regulations. Based upon the view that the cost of retrofitting existing buildings would often be prohibitive and,

that "program accessibility" had proven to be a useful approach, the ADA regulations establish the same standard for existing facilities under its provisions. 28 C.F.R. Appendix § 35.150.

It is important to note that those buildings which were constructed after June 3, 1977, but before January 26, 1992, are considered "new construction" for the purposes of Section 504, but "existing facilities" for the purposes of the ADA. For an excellent discussion comparing the accessibility requirements of the ADA with those of Section 504, see the Senior Staff Memorandum issued by OCR, dated December 1, 1992, 19 IDELR 694.

As applied, the doctrine of "program accessibility" or "programmatic access" as it is often called, does not require that a school system make all existing facilities or every part of the existing facility accessible to and usable by individuals with disabilities. Rather, when a school system operates a program or activity in an existing facility, the program or activity when viewed in its entirety, must be readily accessible to and usable by individuals with disabilities. Compliance with that requirement may be achieved by making nonstructural changes such as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides, home visits. Structural changes are required only when there is no other feasible way to make the program accessible. Where structural changes have to be undertaken in order for the school committee to meet the accessibility requirements of the ADA, those changes are supposed to be completed as expeditiously as possible, but no later than January 26, 1995. 28 C.F.R. § 35.149.

To illustrate, assume that a high school drama club had historically rehearsed and performed its plays on an inaccessible stage in the auditorium. The school would not necessarily be required to make the stage accessible, if it had an established policy, written notice of which is disseminated to its student body, that it would, upon request of an individual with a disability, relocate the activities of the drama club to an accessible location in the school. See In re Whitman-Hanson Regional School District, 20 IDELR 775 (8-19-93). Similarly, program accessibility does not require that every offering of a particular course be held in an accessible location, as long as the school had in place a policy and practice, written notice of which is publicly available, that one or more of the offerings of the course would be provided in an accessible location.

Transition Plan

Where structural changes are required to afford program accessibility, school systems that employ 50 or more persons were required to have completed a transition plan by July 26, 1992, which describes the steps required to complete such changes . 28 C.F.R. 35.150(d). The necessary elements of a transition plan are: 1) identification of physical obstacles that limit accessibility; 2) a description of the methods to make the facilities accessible; 3) a timetable for implementing the changes, and, where the work will take more than one year, the timetable should be broken down by year; and 4) identification of the official responsible for implementation of the plan. 28 C.F.R. § 35.150(b)(3).

Municipal meetings

An important context in which the issue of program access arises is municipal meetings, such as a school committee meeting or an annual town meeting which occurs in the local high school. Even prior to the effective date of the ADA, the Office of the Attorney General sent a letter in May, 1991, to every Massachusetts city or town, informing them that based upon then existing state and federal law, all public meetings, including school committee meetings and public meetings held in schools, had to be held in physically accessible locations. (A copy of Attorney General Scott Harshbarger's letter appears at the end of this chapter as Attachment B).

Upon learning that a municipality is not conducting its meetings in an accessible location, the Office of the Attorney General contacts the municipality to apprise them of the legal obligation to do so. To date, each such instance, has been satisfactorily resolved. While much progress has occurred, ensuring access to municipal events and services continues to be one of the three priority areas for the Attorney General's Disability Rights Project.

F. Communications
(Subpart E of the Title II Regulations 28 C.F.R. § 35.160)

School systems are required "to ensure that communications with applicants, participants, and members of the public are as effective as communication with others." 28 C.F.R. § 35.160. Toward that end, a school system must furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an "equal opportunity" to participate in or enjoy the benefits of, a

service, program or activity of a school committee. 28 C.F.R. § 35.160(b)(1). "Auxiliary aids and services" is defined very broadly, and include qualified sign language interpreters, written materials, telephone handset amplifiers, assistive listening systems and telecommunications devices for deaf persons (TDD's). 28 C.F.R. § 35.104. When disputes arise in this area, they typically involve questions of who determines what auxiliary aid or service is appropriate and whether there are limits to a school's obligation to provide auxiliary aids and services.

The school system must give "primary consideration" to the request of the individual with a disability. 28 C.F.R. 35.160(b)(2). Thus the school should honor the choice of the individual with a disability, unless it can show that: a) another effective means of communication exists; 28 C.F.R. Appendix 35.160. or b) that the requested action: 1) "would result in a fundamental alteration in the nature of the program, benefit or service," or 2) result in undue financial or administrative burden. 28 C.F.R. §35.164. The burden of proving that the provision of the auxiliary aid or services would result in a fundamental alteration or undue burden rests with the school system. That determination must be made by the head of the school system - - typically the superintendent - - or his or her designee. The determination must take into account all available resources, and provide in written form, the basis for reaching the conclusion. 28 C.F.R. § 35.164. As explained in the analysis section of the regulations, the factors to be considered in determining whether a qualified sign language interpreter is required include the context in which the communication occurs, the number of individuals involved,

and the importance of the communication . 28 C.F.R. Appendix § 35.160.

G. Administrative Obligations

In addition to the substantive non-discrimination requirements which the ADA imposes upon school committees, the Act also imposes a series of administrative requirements on all public entities.

1. Self-evaluation

As of January 26, 1993, each school committee was required to conduct a thorough review of its current practices and policies, to evaluate its compliance with the ADA. The school system is required to review its policies and practices in each sub-part of the Title II regulations, i.e. general requirements, employment, accessibility, and communications. As part of its self-evaluation process, the school system shall afford an opportunity for individuals with disabilities and organizations representing such individuals to participate in the process. Based upon the self-evaluation, wherever its policies or practices were found deficient, the school committee should make the necessary modifications. 28 C.F.R. § 35.105. School systems that employ 50 or more individuals must maintain on file for three years and have available for inspection, a list of the individuals that were consulted, a description of the areas examined and any problems identified, and a description of any modifications made. 28 C.F.R. §35.105. If the school system previously completed a Section 504 self-evaluation, it only needs to update that earlier self-evaluation.

2. Notice

School committees must notify all applicants, participants, beneficiaries and other interested persons of its compliance with the non-discrimination requirements of the ADA. For those school systems that employ 50 or more employees, it must also provide notice as to the name, address and telephone number of the designated ADA coordinator (see below) and the existence of a grievance procedure (see below).

3. ADA Coordinator

School systems that employ 50 or more employees (although it is probably desirable for all school systems to do so) are required to designate at least one employee to coordinate and oversee its compliance with the ADA, and to publicize the name, address and phone number of the individual to all interested persons in an accessible format. 28 C.F.R. § 35.107.

4. Grievance Procedures

School systems that employ 50 or more employees (although it is probably desirable for all school systems to do so) must adopt a grievance procedure which provides for a prompt and equitable resolution of complaints. The basis for the requirement is an attempt to resolve complaints at the local level without forcing the complainant to resort to more formal proceedings. A complainant has the option of invoking the internal grievance procedure, but is not required to do so.

H. Enforcement

Title II of the ADA incorporates the enforcement mechanism of Section 504 of the Rehabilitation Act. Thus, a complainant

may file an administrative complaint with the federal enforcement agency. In the case of public schools, the United States Department of Education is the enforcement agency. Since exhaustion of administrative remedies is not required, a complainant has the alternative remedy of filing a suit for equitable relief and/or damages in federal court. A plaintiff who prevails in such a suit would also be entitled to attorney's fees.

I. Conclusion

The ADA has properly been characterized as the most profound civil rights statute enacted since 1964. Since we have, in Massachusetts, some of the most stringent laws protecting the legal rights of individuals with disabilities -- including a unique constitutional amendment -- and because public schools have already been subject to the non-discrimination requirements of Section 504, the ADA does not impose dramatically new requirements. What appears to be different, however, is the higher level of awareness and consciousness on the part of the disability community. School committees need to be fully cognizant of this profound legal mandate in order to ensure equal opportunity for and equitable treatment of all individuals with disabilities. Toward that end, the Office of the Attorney General has been and will continue to be actively involved in education and advocacy to increase everyone's understanding of and compliance with this important law.

ATTACHMENT A

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